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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 130

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT STEWART & SONS, LTD., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion, findings of fact, and conclusions of law of the District Court of the United States for the Eastern District of New York (R. 14–19) have not been officially reported. The opinion of the Court of Appeals for the Second Circuit (R. 25–27) is reported at 167 F. 2d 308.

JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 1948 (R. 28). The petition for certiorari was filed on June 28, 1948, and

was granted on October 11, 1948 (R. 29).[1] The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

A collision occurred in Belgian territorial waters between a British vessel and one owned by the United States and bareboat-chartered to petitioner Black Diamond. In view of the numerous claims which have been and may be filed against them, the United States and Black Diamond filed a petition in a federal district court for limitation of liability, seeking a *forum concursus* for proration of the inadequate liability fund among the various present and potential claimants.

The court below assumed that the limit of petitioners' liability is governed substantively by Belgian law, which is lower than that provided by American law. The principal question presented is whether the circumstance that a lower foreign limitation is applicable substantively has the effect (a) of depriving the district court of jurisdiction to entertain the petition for limitation, and (b) of compelling petitioners to post security beyond the limit of liability imposed by Belgian law. A subsidiary question is whether,

[1] This Court also granted certiorari in *Black Diamond Steamship Corp.* v. *Robert Stewart & Sons, Ltd., et al.* (No. 121), the companion case which arises upon the same record and involves the same respondents.

in any event, the United States is required to post bond, in any amount, as a condition to filing the petition.

STATUTES AND CONVENTION INVOLVED

The pertinent provisions of the American Limitation of Shipowners' Liability Statute of 1851 (R. S. 4283 (a), 4284, 4285 and 4286, 46 U. S. C. 183 (a), 184, 185 and 186) are set forth in Appendix A, *infra*, pp. 48–50. The pertinent provisions of the International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Seagoing Vessels (the applicable Belgian law of limitation of liability) are set forth in Appendix B, *infra*, p. 51.

STATEMENT

On April 28, 1947, the *Norwalk Victory*, a steamship owned by the United States, collided [2] with the British cargo vessel *Merganser* in the Schelde River in the territorial waters of Belgium (R. 16). The *Norwalk Victory* was at that time manned, navigated and operated under a bareboat charter by the Black Diamond Steamship Cor-

[2] The immediate cause of the collision, apart from any question of negligent navigation of either or both ships, seems to have been the derangement of the *Norwalk Victory's* steering gear due to the fact that a four inch piece of marline, left in the vessel's steering system at the time of construction, became lodged in a check valve and thus prevented that vessel from turning to the right in time to avert the collision (R. 4).

poration (Black Diamond) (R. 2). The *Merganser* was loaded with cargo, and as a result of the collision she sank and her chief steward was killed (R. 16).

The *Merganser's* owners instituted suit against Black Diamond in the High Court of Justice of England, Probate, Divorce and Admiralty Division, claiming $1,000,000 for the loss of their vessel (R. 17), and in that suit Black Diamond was required to post security in pounds equivalent to the amount claimed (R. 17). Twenty of the owners of the cargo carried by the *Merganser* filed a suit on October 14, 1947, in the District Court for the Eastern District of New York, against the United States and Black Diamond, asserting cargo loss claims aggregating $1,000,000 (R. 17). Still other *Merganser* cargo-owners (R. 6), and the deceased seaman's representatives, have not yet brought suit against the United States (R. 6). There also is a possibility that the Belgian Government will sue the United States and Black Diamond for damages caused by the collision to the bank of the Schelde River as well as for the cost of removing the wreck of the *Merganser* from the river (R. 6).

Two weeks after the institution of suit by the twenty cargo owners in the District Court for the Eastern District of New York, the United States, as owner, and Black Diamond, as bareboat charterer of the *Norwalk Victory*, filed on October

28, 1947, in the same court, a petition for exoneration from, or limitation of, liability (R. 1–10). The petition, filed within the six months statutory period prescribed by R. S. 4285; set forth the facts concerning the collision and the various asserted and potential claims arising therefrom. Since the collision occurred within the jurisdiction and territorial waters of Belgium, the petition asserted that liability, if any, should be adjudged to be no greater than the maximum permissible under the Belgian limitation of liability law and that such maximum sum should be prorated among the various claimants (R. 6–7, 10). The petition further prayed for a monition directing all claimants for damages resulting from the collision to file their claims with the district court and to appear and answer the allegations of the petition; and for an injunction restraining the prosecution of any action resulting from the collision other than in the present proceeding (R. 9).

Exceptions to the petition were filed by the claimants who had brought the action in the district court. The court, after hearing, found that the law of Belgium as to limitation of liability is the International Convention for the Unification of Certain Rules Relating to the Limitation of Liability of Owners of Seagoing Vessels (Appendix B, *infra*, p. 51); that petitioner's liability, if measured by that law, could not exceed $325,-

028.79;[3] and that Black Diamond had posted in court a surety bond for $325,028.79 (R. 17–18). The district court held, however, that it was immaterial that the collision took place in Belgian territorial waters, and that the "remedy" with respect to limitation of liability was governed by American, and not Belgian, law. Since the security posted by petitioner Black Diamond was less than the value of the owner's interest in the vessel, the court sustained the exceptions and dismissed the petition on the ground that its allegations and the bond posted did not comply with the "jurisdictional" requirements of R. S. 4285 and the appli-

[3] Under the Belgian law, a shipowner's maximum liability for cargo damage is the value of the vessel and of its freight and accessories, or 8 pounds per ton of the vessel's gross tonage, whichever is lower (Article 1, International Convention, Appendix B, *infra*, p. 51). The value of the freight is fixed by Article 4 of the International Convention (Appendix B, *infra*, p. 51) at ten per cent of the value of the vessel at the commencement of the voyage. The *Norwalk Victory's* valuation of $1,000,000 is, of course, even apart from any compensation for freight, far in excess of the $225,028.79 figure arrived at by multiplying the vessel's gross tonnage (6,983.05 tons) by 8 and then by $4.02 13/16 (rate of exchange prevailing on the date of the accident) (R. 18). The sum of $225,028.79, being the lower figure, therefore represents the shipowner's liability under Belgian law. To that figure, the district court (R. 18), as well as the petition itself (R. 8), added ten per cent of the value of the vessel, making a total of $325,028.79.

cable Admiralty Rules[4] (R. 14–19). The district court did not refer to the fact that the United States in the petition for limitation had asked that "no bond be required of it" (R. 8).

On appeal, the Court of Appeals for the Second Circuit in an opinion by Judge Learned Hand held, contrary to the district court, that the Belgian limitation of liability law should be regarded, for purposes of this case, as fixing the maximum liability of the petitioner (R. 26). Nevertheless, it affirmed the dismissal of the petition. The court below reasoned that if, on the one hand, "the limit of all [petitioners'] liabilities is $325,000 and their ship is worth $1,000,000, they have no right to commence such a proceeding as this at all, and are confined to asserting their privilege as a defense to any suits which may be brought against them. If on the other hand they are wrong and the liabilities may go beyond $325,000, on their own argument the bond they propose is too small." (R. 27.) Accordingly, the Court of Appeals held that, in any event, petitioners are not entitled to resort to a *forum concursus* (R. 27). The court below, also, did not advert to the request of the United States that it not be required to post security as a condition to maintaining this proceeding.

[4] Admiralty Rules 51–54 prescribe the procedure governing petitions for limitation of liability.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that petitioner United States had no right to commence a proceeding for limitation of liability.

2. In holding that the record did not present the question whether the Belgian limitation of liability should be referred to in determining whether petitioners were entitled to secure a *forum concursus* and in ascertaining the amount of security to be posted.

3. In failing to hold that the United States was not required to post a bond, apart from the obligation of Black Diamond to do so.

4. In failing to hold that in a limitation proceeding the petitioners are required under R. S. 4285 to post security no greater than the shipowner's maximum liability under the controlling substantive law, which in this case is that of Belgium.

5. In failing to hold that the $325,028.79 bond posted by Black Diamond was sufficient to enable the district court to maintain jurisdiction of the petition for limitation of liability.

6. In failing to hold that the district court improperly dismissed the petition for lack of jurisdiction.

7. In affirming the district court's decree of dismissal.

SUMMARY OF ARGUMENT

I

In 1851, Congress enacted a Limitation of Liability Law for the purpose of putting "American shipping upon an equality with that of other maritime nations" (*The Main* v. *Williams*, 152 U. S. 122, 128). In its substantive aspect, the law limits a shipowner's liability for damages by collision to "the amount or value of the interest of such owner in such vessel". In its jurisdictional and procedural aspects, the law vests the district courts of the United States with jurisdiction over proceedings for limitation of liability, prescribes security and other requirements, and provides that on compliance with these procedural requirements, "claims and proceedings against the owner with respect to the matter in question shall cease". (R. S. 4283 (a) and 4285, 46 U. S. C. 183 (a), 185.) When this legislation was enacted, almost a century ago, the law of every important maritime nation, other than the United States, limited a shipowner's liability to the value of the vessel, and the purpose of the 1851 Act was to remove this inequality against American shipowners. Since that time, however, practically all of the maritime nations, except for the United States, have established a lower limitation.

In the case at bar, the collision occurred in Belgian territorial waters and the limitation im-

posed by Belgian law was assumed applicable by the court below as a matter of substantive law. The principal question presented here is whether this circumstance defeats the jurisdiction of the federal district court to entertain the petition for limitation of liability filed by the United States, as owner of the vessel, and by petitioner Black Diamond, as bareboat charterer, where the security posted by the latter was only in an amount equal to the lower Belgian limitation.

Early experience with the Limitation of Liability Act constrained this Court to admonish the lower courts entrusted with its administration that it was not to be applied "with a tight and grudging hand" but with a view to giving shipowners the full benefit of its immunities (*Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578); and this Court has recently indicated a continuing need for broad and liberal interpretation of the statute's provisions (*Coryell* v. *Phipps*, 317 U. S. 406, 411; *Just* v. *Chambers*, 312 U. S. 383, 385). The refusal of the court below to allow an American shipowner recourse to the Act merely because the substantive limit of his liability, as governed by Belgian law, fixes a lower ceiling than that provided in R. S. 4283 (a), departs from this settled policy of liberal application of the statute's benefits.

II

The question whether the limitation proceeding may properly be maintained depends on a prior determination of the conflict-of-laws problem underlying the case. The court below regarded the Belgian law of limitation as applicable, in view of the undenied allegations of the petition. This is in accord with the position taken by the Government. We believe that the same conclusion can be reached by applying settled conflict-of-law principles. The existence of a tort depends on the law of the place of the wrong. That law also determines the defenses available as well as the measure of damages allowable in a suit arising out of the wrong. Similarly, resort to the *lex loci delicti* is required in ascertaining the extent of a shipowner's limited liability.

The Titanic, 233 U. S. 718, relied on by the district court to justify its contrary conclusion, has no application here. The foreign claimants in *The Titanic* had, by failing to sue the English shipowner under English law in English courts, voluntarily relinquished their right to participate in the larger limitation fund provided by English law. In the present case, however, the claimants seek to increase the amounts recoverable against the American owners by invoking the aid of American courts. *The Titanic* does not hold that, in such circumstances, the higher American limitation should have the effect of depriving a federal court of jurisdiction. Moreover, *The Titanic* in-

volved an accident on the high seas, not in territorial waters within the jurisdiction of a foreign government.

III

In affirming dismissal of the limitation proceeding, the court below deprived petitioners of their right to a *forum concursus,* which ordinarily enables a shipowner, confronted by claims exceeding the amount of his limited liability, to bring all such claims into concourse and have them adjudicated in a single limitation proceeding. This denial of access to a *forum concursus* also prejudices the right of present and potential claimants to secure a fair distribution of the limited liability fund.

A. It is not disputed that a petition for limitation of liability should be dismissed where the limited liability fund exceeds the asserted and potential claims against the petitioning shipowner. Such is not the case here, where the total claims are greater than the liability fund, whether it be computed under the Belgian or American limitation of liability law.

B. A literal reading of R. S. 4285 may justify requirement of a bond equal to the value of the shipowner's interest in the vessel and its freight, irrespective of the amount of his limited liability: However, the statute, properly construed in relation to its purpose, requires posting of security

equal to and not exceeding the maximum amount of liability under the controlling substantive law.

C. Whatever the bond requirements of R. S. 4285 may be, they have no application to the United States. The fact that no bond, in any amount, need be posted by the United States in a limitation proceeding should, in itself, have impelled the court below to reverse the dismissal of the petition, at least so far as the United States was concerned.

D. The court below apparently overlooked the Act of June 5, 1936, which amended R. S. 4285 so as to require the shipowner to assert his privilege of limited liability within six months after claim has been made against him. The effect of that amendment is to bar the filing of any new petition after the six months period. In these circumstances, even if the petition was defective with respect to the security posted, the court below should nevertheless have permitted the petition to stand, thus permitting petitioners to amend it so as to remove any procedural defects. Such disposition, which would have been consistent with that followed by the court below in earlier cases, could not possibly have prejudiced any claimants and would not have deprived petitioners of the right to limit their liability and secure a *forum concursus*.

ARGUMENT

PETITIONERS ARE ENTITLED TO MAINTAIN THIS LIMITATION PROCEEDING AND SECURE A FORUM CONCURSUS

I

INTRODUCTION

A. *Preliminary Analysis.*—The court below assumed, in view of the undenied allegations of the petition as to the applicable law, that the limit of petitioners' liability, as a matter of substantive law, is to be determined by reference to the law of Belgium (R. 26). This was in accord with the Government's position, although (as we shall elaborate in Point II, *infra*, pp. 23–32) we believe the court below should have reached this conclusion by a somewhat different route.

The principal issues raised by the petitions for certiorari are jurisdictional and procedural in nature; in particular, whether the limitation procedure provided by Congress in the Limitation of Shipowners' Liability Act of 1851[5] is available to American shipowners in situations like this, where the substantive limit of liability is governed by a foreign law which fixes a lower ceiling than that provided in the Act. The court below held that the limitation proceeding is not available here because the petitioners are "in a dilemma from which they cannot escape" (R. 27).

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[5] 9 Stat. 635, 46 U. S. C. 182, *et seq.*, incorporated into the Revised Statutes at Sections 4282 to 4290.

The court below described the dilemma as follows: If, as a matter of substantive law, petitioners' liability will never exceed $325,000, and their ship is worth $1,000,000, they are not now entitled to a *forum concursus*. (The court below stated this categorically, as if it were a self-evident proposition, without giving any reasons for it.) If, on the other hand, the Belgian substantive limitation does not apply, and petitioners may be subject to liabilities exceeding $325,000, the petition must fail because the security posted in that amount by Black Diamond is inadequate. "Thus as things stand," the court below stated, "the petitioners are not entitled to resort to a *forum concursus*." (R. 27.)

With due deference to the learning and authority of Judge Learned Hand in this field, it is respectfully submitted that the "dilemma", on the horns of which the court below has impaled petitioners, is entirely of its own making. The Government contends (1) that the Limitation of Liability Act, properly construed, gives an American shipowner the right to obtain a *forum concursus* wherever the fund available for payment of liabilities is inadequate and should be distributed *pro rata* among the present and potential claimants; (2) that the limit of the shipowner's liability is "the amount or value of the interest of such owner in such vessel," as provided in R. S. 4283 (a), unless the circumstances are such that a

lower foreign limitation is applicable substantively as a matter of conflict-of-laws principles; (3) that where a lower foreign limitation is applicable substantively, it has neither the effect of depriving the district court of jurisdiction nor of compelling the petitioner to post security beyond the limit of his maximum liability; (4) that even if the lower foreign limitation is not applicable in this case, petitioners are nevertheless entitled to maintain this limitation proceeding because—regardless of whether the limit of their liability is $1,000,000 or $325,000—the fund available is inadequate to meet the present and potential claims, and a *forum concursus* is necessary in order to achieve an equitable and ratable distribution among the various claimants; (5) that the United States is not required to post security as a condition precedent to filing a petition for limitation of liability, and dismissal of the petition as to the United States was therefore in any event improper; (6) that the security posted by petitioner Black Diamond was adequate in the circumstances of this case; and (7) even if we are wrong in our previous contentions, and the petition for limitation was defective because of inadequacy of the security posted, this defect was not jurisdictional and the courts below should not have dismissed the petition. In view of the six-months' statute of limitations, apparently overlooked by the courts below, dismissal has the effect of bar-

ring the filing of a new, amended petition. The courts below should, in any event, have permitted the petition to stand, thus enabling petitioners to amend it so as to remove any procedural defects.

B. *General Background.*—Since the case involves concepts in the field of admiralty law which are technical and unfamilar, it may be appropriate to preface our argument with a brief description of the history and purposes of the laws dealing with limitation of shipowners' liability, and the function of the limitation proceeding and its chief attribute, the *forum concursus.*

The principle of limiting the shipowner's liability to the value of his interest in the vessel and its freight appears to deprive from the concept of contract of "commande" in the law merchant, under which a merchant might entrust his goods to another to be used in trade and limit his liability to the amount thus entrusted. *The Rebecca,* 20 Fed. Cas. 373, 378 (D. C. Me.). By the end of the seventeenth century, this principle had become firmly established in the admiralty law of the leading maritime nations of Europe, except England. *The Main* v. *Williams,* 152 U. S. 122, 126.

At common law, both in England and America, "the personal liability of the owner of a vessel for damages by collision is the same as in other cases of negligence, and is limited only by the amount of the loss and by his ability to respond."

The Main v. *Williams, supra,* at 126. Early in the nineteenth century, Massachusetts and Maine allowed local shipowners to invoke privileges of limited liability. Mass. Laws (1818) c. 122, secs. 1–3, amended by Mass. Rev. Stat. (1836) c. 32, secs. 1–4; Me. Laws (1822) c. 14, secs. 8–10. However, it was not until after the decision of this Court in 1848 in *New Jersey Steam Navigation Co.* v. *Merchants Bank,* 6 How. 344, which held a shipowner fully liable for heavy damages caused by his crew's negligence, that the need for nation-wide extension of limited liability benefits was generally recognized. The "uneasiness produced among ship owners by this decision", and the need for "putting American shipping upon an equality with that of other maritime nations", prompted Congress in 1851 to enact the Limitation of Shipowners' Liability Act.[6] See *The Main* v. *Williams,* 152 U. S. 122, 128; *Liverpool &c. Nav. Co.* v. *Brooklyn Terminal,* 251 U. S. 48, 53.

The heart of the Act, R. S. 4283 (a), limits the shipowner's liability for property loss or damage to the amount of his interest in the vessel and its freight,[7] and so adopts the classic device by which the law has encouraged the risking of capital—the limitation of the investor's liability

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[6] 9 Stat. 635, 46 U. S. C. 182 *et seq.*, incorporated into the Revised Statutes at Sections 4282 to 4290.

[7] Personal injury and death claims are placed, so far as limitation of shipowners' liability is concerned, on a statutory basis differing from that fixing his maximum liability for hull or cargo damage and loss. R. S. 4283 (b), 46 U. S. C. 183 (b).

to the amount of his stake in the venture.[8] Since the passage of the Act, this Court has carefully protected the right of the shipowner to limit his liability by construing R. S. 4283. (a) liberally in order to effectuate its purpose of fostering the investment of capital in shipping. *Larsen* v. *Northland Transportation Co.*, 292 U. S. 20, 24; *American Car & Foundry Co.* v. *Brassert*, 289 U. S. 261, 263; *Norwich Company* v. *Wright*, 13 Wall. 104, 121; *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527, 549; *Just* v. *Chambers*, 312 U. S. 383, 385; *Coryell* v. *Phipps*, 317 U. S. 406, 411; *Providence & New York Steamship Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 589. The purposes of the legislation which have guided the courts in construing it have been expressed in various ways: "to promote the building of ships, and to encourage persons engaged in the business of navigation" (*Moore* v. *American Transportation Co.*, 24 How. 1, 39); "to encourage investments in ships and their employment in commerce" (*American Car & Foundry Co.* v. *Brassert, supra*, at 263); to put "American shipping upon an equality with that of other maritime nations" (*The Main* v. *Williams, supra*, at 128); and "to give our shipowners a chance to compete with those of Europe" (*Liverpool &c. Nav. Co.* v. *Brooklyn Terminal*, 251 U. S. 48, 53).

[8] A shipowner's limited liability has often been compared to that of the corporate stockholder. *Norwich Co.* v. *Wright*, 13 Wall. 104, 121; Holmes, *The Common Law* (1881) 6–7.

While this Court was insisting on liberal construction of the Act in order to aid in the achievement of its objectives, foreign countries were making substantive changes in their limitation of liability laws to such an extent that today nearly all foreign limitation laws[9] are more generous to the shipowner, allowing him to take advantage of a liability limit considerably lower than that available under R. S. 4283 (a).

The English statute,[10] which is also controlling in Australia, Canada, India and South Africa, limits the shipowner's liability, for cargo loss or damage, to 8 pounds per ton.[11] This limit is more favorable to the shipowner than that provided under R. S. 4283 (a) since the value of the

[9] See Committee Report on the History and Present Status of Domestic and Foreign Laws Concerning Shipowners' Liability, Maritime Law Association of the United States, Doc. No. 196 (1935), 2026, 2027, listing thirty-one foreign countries, including Great Britain, Germany, France, Japan, Norway, Italy and Belgium, which have limitation of liability systems in effect. Benedict lists still other foreign nations which have also limited shipowners' liability. 6 Benedict, *Admiralty* (6th ed., Knauth, 1941) 88.

[10] The Merchant Shipping Acts, 57 & 58 Vict., c. 60, sec. 503 (1894); 61 & 62 Vict., c. 14 (1898), 63 & 64 Vict., c. 32, sec. 1 (1900).

[11] The figure of 8 pounds per ton was fixed on the supposition that the total British tonnage divided into its aggregate value would equal that amount. The justification of this 8 pound per ton figure is "that *on the average* that will fairly represent the value of the shipowner's interest in the joint venture." Report to the President of the Delegates of the United States to the International Conference on Maritime Law (1922), 54.

offending vessel is generally large in proportion to its tonnage.[12]

Even more favorable to the shipowner are the limitations of liability applicable in Belgium, as fixed in 1924 by the International Maritime Committee in the Brussels Convention upon the Limitation of Shipowners' Liability. This Convention, which has been adopted not only by Belgium, but by Brazil, Denmark, Finland, France, Hungary, Monaco, Norway, Poland, Portugal, Spain, and Sweden,[13] limits the shipowner's liability for cargo loss or damage to either 8 pounds per ton or the value of the vessel and its freight and accessories, whichever is lower (Appendix B, *infra*, p. 51).

To effectuate the immediate purpose of R. S. 4283 (a), *i. e.* the limitation of the shipowner's liability to the value of his interest in the vessel and its freight, this Court, in 1872, promulgated Admiralty Rules 54–57 (now 51–54) prescribing the practice in limitation proceedings. A shipowner, seeking the benefit of a limitation statute, may file a petition in a United States District

[12] It is only in those situations where the offending vessel becomes a total loss in the accident that it would be to the shipowner's advantage to invoke R. S. 4283 (a), since his interest in the value of the vessel (*i. e.*, the measure of his liability) is ascertained after the disaster. *The City of Norwich*, 118 U. S. 468, 493; *The Benefactor*, 103 U. S. 239, 246–247; *Norwich Co.* v. *Wright*, 13 Wall. 104, 126–127.

[13] 6 Benedict, *Admiralty* (6th ed. Knauth, 1941) 88.

Court in admiralty against one claiming damages for loss. The petition ordinarily asks that the shipowner's liability, if the vessel be found at fault, be limited to the value of the vessel and its freight, and that all others having similar claims against the vessel and the owner be brought into concourse in the proceeding, by monition, and enjoined from suing the vessel and owner on such claims in any other court. *Hartford Accident Co.* v. *Sou. Pacific,* 273 U. S. 207, 214–215.

This bringing of all claims into concourse, generally referred to as a *forum concursus,* establishes a shipowner's limited liability fund and enables it to be distributed, as required by statute, among the claimants "in proportion to their respective losses". R. S. 4284; see *Butler* v. *Boston & Savannah Steamship Co.,* 130 U. S. 527, 550–551, 552; *Monongahela River Consol. Coal & Coke Co.* v. *Hurst,* 200 Fed. 711, 713 (C. C. A. 6). As this Court has said, the limitation proceeding, including its *forum concursus,* "partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader, and a creditor's bill." *Hartford Accident Co.* v. *Sou. Pacific,* 273 U. S. 207, 216.

The limitation proceeding thus serves a dual function: (1) it protects the shipowner by establishing a limit upon his total liability; and (2) it protects the present and potential claimants by providing for fair and ratable distribution of the

limited liability fund among the various claimants. See *The Aquitania*, 20 F. 2d 457 (C. C. A. 2). Such proration, which assures all claimants of a partial, proportionate recovery, can be accomplished only by bringing all asserted and potential claimants into a single proceeding. *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 594. The statute, recognizing that multiple suits may destroy the benefits of limitation, itself enjoins "all claims and proceedings against the owner" where the latter has filed a proper petition for limitation of liability. R. S. 4285; see *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 599, 600; *The San Pedro*, 223 U. S. 365, 372; *Dowdell* v. *United States District Court*, 139 Fed. 444, 445 (C. C. A. 9); *The Pelham*, 69 F. Supp 586, 587 (S. D. N. Y.); *The Tolchester*, 42 Fed. 180, 184–185 (D. Md.). The resulting concourse of all claims assures claimants, present and potential, that they will receive their fair and equitable share of the limited liability fund.

II

THE CHOICE-OF-LAW PROBLEM

As has been stated, the case involves a preliminary choice-of-law question whether the limit of petitioners' liability is governed by the law of Belgium, the situs of the collision, or of the United States, the forum. The district court, citing *The Titanic*, 233 U. S. 718, and *Royal Mail*

Steam Packet Co. v. *Companhia de Navegaco Lloyd Brasileiro*, 31 F. 2d 757 (E. D. N. Y.), held that in a limitation proceeding such as this the issue of limitation liability is determined exclusively by reference to the law of the forum (R. 15). This holding was apparently rejected by the court below (R. 26). In his opinion for that court, Judge Learned Hand noted that the case arose upon exceptions to the limitation petition, and that its allegations as to foreign law, which are treated as allegations of fact,[14] are to be regarded as conclusive. Construing the petition "with as favorable an eye as is possible" (R. 26), the court below read the petition as containing an allegation that the limitation of liability imposed by Belgian law "attached to the right" and hence was applicable as a matter of substantive law in the present proceeding.

While the Government agrees with this conclusion as to the applicability of Belgian law, we believe it can rest on a broader basis. Even if

[14] Since exceptions serve the same function as a demurrer, the petition's allegations of fact stand admitted. *Suspine* v. *Compania Transatlantica Centroamericana, S. A., et al.*, 37 F. Supp. 263, 264–265 (S. D. N. Y.); *The Senator*, 54 F. 2d 420 (D. Del.); *The Blue Mountain, Etc., Line* v. *Youghiogheny & Ohio Coal Co.*, 20 F. Supp. 165 (D. Conn.). This admission extends to allegations as to foreign law, which are treated as allegations of fact (R. 37). See *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 444; *Rowan* v. *Commissioner of Internal Revenue*, 120 F. 2d 515 (C. C. A. 5); *Empresa Agricola Chicama Ltda.* v. *Amtorg Trdg. Corp.*, 57 F. Supp. 649, 650 (S. D. N. Y.).

this case had not arisen upon the pleadings, the court below would have been justified in holding, on the basis of well settled conflict-of-laws principles, that in a proceeding growing out of a collision between vessels in the territorial waters of another country, the limit of liability provided by the law of that country should be applied, at least where, as here, that limit does not exceed the limit provided by the law of the United States. It is axiomatic that liability for a tort depends upon the law of the place where it occurred, and that that law also determines the defenses available as well as the measure of damages allowable in a suit based thereon. In *Cuba Railroad Company* v. *Crosby,* 222 U. S. 473, 479, Mr. Justice Holmes wrote for the Court:

> We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation.

Accord: *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 356.

Early in its history, this Court applied these principles in a case arising out of a collision between two American vessels in the port of Liverpool (*Smith* v. *Condry,* 1 How. 28, 33):

> The collision having taken place in the port of Liverpool, the rights of the parties

> depend upon the provisions of the British Statutes, then in force; and if doubt exists as to their true construction, we must of course adopt that which is sanctioned by their own courts.[15]

English collision cases are in accord: See *The Arum,* [1921] Prob. 12, 20; *The M. Moxham,* [1876] 1 Prob. 107, 111; *The Hagen,* [1908] Prob. 189.

On the specific question as to the law governing the measure of damages and limit of liability, it is equally well settled that where the place of the wrong allows a lesser recovery than the forum, it is obviously unfair to award damages on the higher basis and thus give plaintiffs an incentive for shopping around for the most favorable forum. *Slater* v. *Mexican National Railroad Company,* 194 U. S. 120, held that a court should not render judgment for damages in excess of that allowed by the law of the place of the wrong. A contrary holding, it was pointed out, would "deny

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[15] In *Smith* v. *Condry, supra,* the defendant argued that he was not liable because his vessel, at the time of the collision, was under the control of an official pilot. Under British law at the time, official pilotage was a good defense in a collision suit, because the pilot was not deemed an agent of the shipowner and the doctrine of *respondent superior* was therefore inapplicable. Since this defense was available under English law, and the accident occurred in British territorial waters, this Court allowed the defendant shipowner, in a suit brought in this country, to exonerate himself from liability by invoking the same defense. In *The Arum, supra,* where the collision occurred in Gibraltar harbor, the English court applied Gibraltar law which exonerated a shipowner from liability for the negligence of a compulsory pilot, even though under the English statute, then in effect, compulsory pilotage was not a good defense.

the defendant the benefit of whatever limitations on his liability" he would otherwise have available (194 U. S. at 126). Accord: *Western Union Telegraph Co.* v. *Brown,* 234 U. S. 542.[16] This principle is also applied in admiralty. *The Sidra,* decided by a British-American Claims Tribunal, reported in Williams and Lauterpacht, *Annual Digest of Public International Law Cases* (1919–1922) 100; *The Mandu,* 102 F. 2d 459, 463, 114 F. 2d 361 (C. C. A. 2), certiorari denied, 311 U. S. 715; *The Eagle Point,* 142 F. 453 (C. C. A. 3), certiorari denied, 189 U. S. 510, 201 U. S. 644; (Cf. *Canada Malting Co.* v. *Paterson Steamships, Ltd.,* 285 U. S. 413, 424).

The district court in the present case fell into error in believing that *The Titanic,* 233 U. S. 718, is in conflict with the settled principles discussed above. In that case a British vessel collided on the high seas with an iceberg, and sank with considerable loss of life and property. A number of claimants, including English nationals, brought actions against the shipowner in federal and state courts, and the principal question was whether the shipowner could maintain a limitation of liability

[16] State courts follow the same rule and allow damages for an extraterritorial tort only to the extent that the place of the wrong recognizes such damages. *Rauton* v. *Pullman Co.,* 183 S. C. 495, 191 S. E. 416; *Thomas* v. *Western Union Telegraph Co.,* 25 Tex. Civ. App. 398, 61 S. W. 501; *Christensen* v. *Floriston Pulp & Paper Co.,* 29 Nev. 552, 92 Pac. 210; *Louisville & N. R. Co.* v. *Lynch,* 137 Ky. 696, 126 S. W. 362. See also *Giddings* v. *Zellan,* 160 F. 2d 585 (App. D. C.), certiorari denied, 332 U. S. 759; *Hupp Motor Co.* v. *Wadsworth,* 113 F. 2d 827 (C. C. A. 6).

proceeding in this country. The Court, in an opinion by Mr. Justice Holmes, held that the proceeding could be maintained and that the laws of the United States respecting limitation of liability should be applied.

The Titanic is distinguishable on two separate grounds:

(1) The decisive factor in that case, as is indicated by the opinion, was that the foreign claimants, by resorting to American courts, voluntarily relinquished the higher benefits of the English law of limitation of liability. The question before the Court was "only whether those [foreign claimants] who do see fit to sue in this country are limited in their recovery irrespective of the English law" (233 U. S. at 732–733). The opinion indicates that the "essential point" of the case is that "the limitation might be applied to foreign ships if sued in this country although they were not subject to our substantive law" (p. 733). It is in this context that we must read the sentence appearing a few lines later in Mr. Justice Holmes' opinion: "This statute well might be held to announce a general policy, governing both obligations that arise within the jurisdiction and suits that are brought in the courts of the United States" (*ibid.*). In the present case, unlike *The Titanic*, we have no question of voluntary relinquishment by foreign claimants of a right to a larger foreign limitation. Here, the problem is

rather whether claimants should be permitted to increase the amount of their recovery by taking advantage of the higher limitation of the forum and thus impose upon an American shipowner a liability greater than that prescribed by the law of the place of the wrong.

(2) Moreover, *The Titanic* dealt with a collision which occurred on the high seas rather than within territorial waters. In connection with collisions on the high seas "where the law of no particular State has exclusive force, but all are equal", it is only natural for the forum to invoke "its own law as presumptively expressing the rules of justice". See *The Scotland,* 105 U. S. 24, 29; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 355-356; *The Hamilton,* 207 U. S. 398, 403.

The opinion below in the present case apparently agreed with our views as to the inapplicability of *The Titanic.* Judge Hand stated that "we are not to understand the decision in *The Titanic, supra,* as meaning that we would refuse to recognize limits imposed upon an owner's liability by other nations which they attached to the right" (R. 26). *The Titanic* clearly stands only for the proposition that where a foreign vessel has sunk on the high seas, the claimants' maximum recovery in our courts may not exceed that set by the limitation of liability law of the United States, if that law allows a lesser recovery

than the law of the flag of the ship. In situations like the present case, however, where a collision occurs within the territorial waters of a foreign country having a limitation lower than that provided by the United States, and the lower foreign limitation "attaches to the right", it should be enforced in the courts of this country.

This conclusion is required not only by the authorities already cited but by considerations of policy. Enforcement of the foreign limitation is necessary to protect American shipowners from being discriminated against merely because claims have been filed in the United States rather than in the courts of the place of the wrong. Reference by an American court exclusively to our own limitation of liability laws so as to deprive American shipowners of a lower limitation imposed by the *lex loci delicti* would encourage foreign claimants to resort unduly to our courts. While there may be justification, as *The Titanic, supra,* indicates, for the forum's refusal to impose a higher foreign limitation, these same policy considerations cannot justify refusal to apply a lower foreign limitation.

This Court has said in another context that "the law of the forum is material only as setting a limit of policy beyond which" an obligation arising in a foreign country would not be enforced here. *Cuba Railroad Co.* v. *Crosby,* 222 U. S. 473, 478. R. S. 4283 (a) sets a maximum, and not a

minimum, limitation. It involves no inconsistency with the statute to enforce a lower foreign limitation. Indeed, to do so is in strict accord with the fundamental purpose of our limitation of liability laws, namely, to encourage investments in shipbuilding and the employment of ships in commerce. *Butler* v. *Boston and Savannah Steamship Co.*, 130 U. S. 527, 549; *Just* v. *Chambers*, 312 U. S. 383, 385; see cases cited, p. 19, *supra*. And this Court has frequently emphasized the need for construing these laws "broadly and liberally" so as to achieve their fundamental purpose. *Coryell* v. *Phipps*, 317 U. S. 406, 411; *Larsen* v. *Northland Transportation Company*, 292 U. S. 20, 24; *Providence & New York Steamship Co.* v. *Hill Manufacturing Co.*, 109 U. S. 578, 589.

As has been shown (*supra*, pp. 20–21), nearly all foreign limitation laws are more advantageous to the shipowner than R. S. 4283 (a). Since these foreign limitation laws generally allow a lower limit of liability than does the American law, a requirement that the federal courts must apply the American limitation even with respect to collisions occurring in foreign territorial waters would encourage foreign claimants to file their claims against the shipowner in the courts of the United States. There is no reason to suppose that Congress intended that claimants should thus be enabled to derive financial advantage at the

expense of American shipowners. It is submitted, on the contrary, that considerations of policy favor application by the forum of the lower limitation of liability which would have been applied had suit been brought where the tort was committed. In this aspect the question is comparable to those which have arisen out of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, and the rulings made by this Court in dealing with such problems should be persuasive here. See *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109; *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487; *Cities Service Co.* v. *Dunlap*, 308 U. S. 208; *Palmer* v. *Hoffman*, 318 U. S. 109, 117; and see *Sampson* v. *Channell*, 110 F. 2d 754 (C. C. A. 1).

III

THE PETITION FOR LIMITATION OF LIABILITY SHOULD NOT HAVE BEEN DISMISSED

The principal error committed by the court below, in affirming dismissal of the petition for limitation, was to deprive petitioners of their right to a *forum concursus*, a right which is clearly conferred by the Limitation of Liability Law and which is corollary to the substantive right of limitation. If the judgment of dismissal stands, the right to petition for limitation of liability has been irrevocably lost in view of the six-months' time limit, apparently overlooked by the court below, imposed on that right since 1936.

A. The Necessity for Proration of the Limited Liability Fund among the Present and Potential Claimants Requires a "Forum Concursus"

When the shipowner's liability, as limited by statute, is insufficient to pay each of the several claimants in full, R. S. 4284 averages the loss by expressly prescribing a distribution among the claimants "in proportion to their respective losses." *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527, 550–551, 552; *Monongahela River Consol. Coal & Coke Co.* v. *Hurst*, 200 Fed. 711, 713 (C. C. A. 6). To effectuate such proration, it is essential that all asserted and potential claims be brought into a single proceeding. *Providence & N. Y. SS Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 594. Concededly, as the court below pointed out (R. 27), a shipowner may assert limited liability in any suit instituted against him. *The Scotland*, 105 U. S. 24, 33–34. But judgments for different claimants in such separate suits, the amount of each of which is no greater than the shipowner's limited liability might, when aggregated, result in a total liability far in excess of the statutory limitation. Moreover, it would be manifestly unjust to later claimants if the limited fund were to be exhausted through satisfaction of those claims which happened to be prosecuted earliest.

The statute, recognizing that multiple suits may destroy the benefits of limitation, itself enjoins "all claims and proceedings against the owner" where the latter has filed a proper petition for

limitation of liability. R. S. 4285; see *Providence & N. Y. SS Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 599–600; *The San Pedro*, 223 U. S. 365, 372; *Dowdell* v. *United States District Court*, 139 Fed. 444, 445 (C. C. A. 9); *The Pelham*, 69 F. Supp. 586, 587 (S. D. N. Y.); *The Tolchester*, 42 Fed. 180, 184–185 (D. Md.); *In re Long Island North Shore Passenger and Freight Transportation Co.*, 5 Fed. 599, 628 (S. D. N. Y.). And Admiralty Rule 51, promulgated by this Court to implement the statute, directs the issuance of monitions compelling all claimants to appear and present their claims to the court in which the limitation petition was filed.[17] The resulting *forum concursus* thus makes possible fulfillment of the chief object of a limitation proceeding, i. e., the proration among the claimants of a fund which is insufficient to pay all claims in full but which represents the amount of the shipowner's maximum limited liability. See *The Quarrington Court*, 102 F. 2d 916, 918 (C. C. A. 2), certiorari denied *sub nom. Court-Line, Ltd.* v. *Isthmian Steamship Co.*, 307 U. S. 645; *Providence & N. Y. SS. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 594.

Of course, where the limited liability fund is large enough to enable full payment to all claim-

[17] Local court rules require publication of the monition, as well as direct service thereof, on all known claimants. See, *e. g.*, Rules 34–35, D. C. S. D. N. Y.; Rules 36–37, D. C. W. D. Wash.

ants, there is no need for proration or *concursus*. *The Aquitania*, 20 F. 2d 457 (C. C. A. 2). On the other hand, where the asserted and potential claims against the shipowner exceed the amount of the fund, a *forum concursus* is essential to effectuate the statutory proration. And the courts consistently heretofore, including the court below, have held that in such circumstances a petition to limit liability and secure a *concursus* is not subject to dismissal. *Curtis Bay Towing Co.* v. *Tug Kevin Moran, Inc.*, 159 F. 2d 273, 276 (C. C. A. 2); *Colonial Sand & Stone Co.* v. *Muscelli*, 151 F. 2d 884 (C. C. A. 2); *Anderson* v. *Alaska Steamship Co.*, 22 F. 2d 532, 534 (C. C. A. 9); *The George W. Fields*, 237 Fed. 403 (S. D. N. Y.).

The dismissal of the petition for limitation in the instant case is in direct conflict with these precedents. Twenty cargo claimants have already filed suit in the Eastern District of New York demanding $1,000,000 from petitioners for loss of their cargo (R. 17).[18] A suit against Black Diamond, claiming an additional $1,000,000 in damages, has been instituted in English courts (R. 17). Still further suits, seeking wrongful death damages as well as to recover for damages to the bank of the

[18] The record shows that still other cargo-owners may file additional suits (R. 6). We are advised that the libel filed in the Eastern District of New York by the cargo claimants has been amended to include some additional claims. The amended libel seeks damages in the amount of $900,000.

Schelde River are possible (R. 6). For the satisfaction of these claims which may aggregate millions of dollars, there is available a limited liability fund, which, even if determined without reference to the Belgian law, does not exceed $1,000,000.[19] It is clear, therefore, that the total amount of asserted and assertable claims far exceeds any limited liability fund—whether Belgian or American law applies—which would be available to the claimants in this case.

We believe that the Belgium limitation governs substantively and does not operate to defeat the district court's jurisdiction. The court below, assuming with petitioners that the Belgian limitation was applicable substantively, held nevertheless that the present proceeding could not be maintained because the amount of maximum lia-

[19] In the usual limitation case, not involving the foreign law problem here presented, maximum recovery is limited, under R. S. 4283 (a), to the value of the vessel and her freight as ascertained at the end of the voyage. *The City of Norwich*, 118 U. S. 468, 490–491; *The Great Western*, 118 U. S. 520; *The Doris Eckhoff*, 30 Fed. 140 (S. D. N. Y.). The record reveals that the *Norwalk Victory* was valued at $1,000,000 (R. 8), but is silent as to the value, if any, of the freight for the cargo she carried on the voyage out of which the claims arose. See *The Main* v. *Williams*, 152 U. S. 122, 131–132; *LaBourgogne*, 210 U. S. 95, 134–135; *In re Meyer*, 74 Fed. 881, 897 (N. D. Cal.). This absence of information as to the value of the freight evidently led the court below to assume that there was no compensation due the petitioners for freight, and that liability could not exceed $1,000,000. A bond in that amount would, the court concluded, therefore be required under R. S. 4285 (R. 26).

bility under Belgian law ($325,000) was less than the value of the vessel ($1,000,000). The court regarded this as fatal to the petition, because petitioners could not, on their own assumption, be liable in an amount exceeding $325,000, and hence the court evidently believed there was no necessity for the present proceeding.

The answer to this argument is clear. As has been shown, a limitation proceeding is intended to protect not only the shipowner but also the claimants, present and potential. The argument of the court below that a shipowner is not entitled to a *forum concursus*, merely because there is no danger that he will be compelled to pay more than the maximum provided by the law, obviously goes too far. If valid, it would equally deprive a shipowner of a *forum concursus* in the ordinary situation, not involving any foreign elements, where the American limitation unquestionably applies. If, for example, the collision in the present case had occurred in territorial waters of the United States, the limit of liability would, of course, be $1,000,000. However, if the petitioners, faced with these claims (which may well run into millions of dollars), had filed a petition for limitation in the Second Circuit, they could be met by the argument made below by Judge Hand, namely, that they were not entitled to maintain the petition because the $1,000,000 limitation could always be asserted as a defense to any suits that might be brought. It seems obvious

that such an argument would be wholly inconsistent with the purpose of the statute to afford a forum in which all the claims, asserted and assertable, could be brought in and satisfied as equitably and fairly as possible.

The defect in Judge Hand's argument is equally apparent, whether the assumed limit of liability is $325,000 or $1,000,000. The decisive fact is that the amount of claims which have been or may be filed is greater than either amount, and hence there is a clear necessity for proration of the inadequate liability fund among the various present and potential claimants. This is an *à fortiori* conclusion in the present case because the lower Belgian limitation clearly applies.

It cannot be contended that petitioners' right to a *forum concursus* should be defeated merely because the substantive limit of liability is derived from the *lex loci delicti*, and is less than the value of the vessel. To be sure, the statutory provisions—enacted by Congress almost a century ago—were apparently drafted on the assumption that the limit of liability would be the value of the vessel. When this legislation was enacted, the law of every important maritime nation limited shipowners' liability to the value of the vessel. At that time, therefore, it was immaterial, as a practical matter, whether the American or a foreign limitation applied substantively: both were identical. This explains why Congress used the phrase "the value of the * * * vessel".

The use of this phrase does not imply, we submit, that Congress intended to deprive the district courts of jurisdiction over limitation proceedings where the applicable substantive law imposed a lower limitation than that of the United States. This Court has held that foreign vessels may resort to the federal courts for limitation of liability under R. S. 4283. See *The Scotland*, 105 U. S. 24; *LaBourgogne*, 210 U. S. 95; *The Titanic*, 233 U. S. 718, 731. It would be anomalous to hold that Congress has precluded American shipowners from obtaining a *forum concursus* in the courts of the United States in cases where the limit of liability, governed by laws of foreign countries enacted since 1851, is less than the value of the vessel; and we do not understand the opinion below to convey any intimation that this is the effect of the statute. Since a shipowner will be entitled, in any event, to assert his limit of liability, as a defense to any suits which may be brought, as Judge Hand pointed out (R. 27), it is only fair to all the claimants, present and potential, that there be a concourse now in which the liability fund may be distributed equitably and ratably, rather than that the matter be dealt with in a series of unrelated and perhaps conflicting lawsuits.

B. The Security Posted by Petitioner Black Diamond Satisfies the Requirements of the Statute

R. S. 4285 requires a shipowner who petitions for limitation of liability to deposit with the court "for the benefit of claimants," approved

security equal to the amount of the owner's interest in the vessel and its freight. The act further authorizes the court to require such additional security as the court determines may be "necessary to carry out the provisions" of the Limitation of Liability Statute. These two statutory provisions clearly express the obvious purpose of the bond requirement, *i. e.*, to assure payment to the claimants of any amounts found due them.

It is true that a literal reading of R. S. 4285 would call for a bond for the full value of the owner's interest in the vessel and its freight. However, it is obvious the statutory language was cast in terms of the value of the interest in vessel and freight which, in the normal limitation situation, represent the shipowner's maximum liability and fix the fund available to claimants. Certainly, where the actual, maximum liability is far less than the value of that interest, requiring a bond for a sum in excess of the actual, maximum liability could not possibly inure to "the benefit of claimants" and would, as petitioners argued below, "merely * * * impose an idle burden on the shipowner and * * * benefit no one but the bonding companies" (R. 27). Such futile and unreasonable result, in no way related to the purpose of the statute, should be avoided. *United States* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 543; *Armstrong Co.* v. *Nu-Enamel Corp.*, 305

U. S. 315, 333; *Sorrells* v. *United States*, 287 U. S. 435, 446, *et seq.*

C. In Any Event, Dismissal of the Petition Was Improper as to the United States

The court below assumed that, if the limited liability fund actually was in excess of $325,000, the $325,000 "bond they [*i. e.*, the United States and Black Diamond] propose is too small." This conclusion entirely overlooks the fact that, so far as the United States is concerned, it may petition for limitation of its liability without posting any bond at all. Section 2408 of the newly-revised Title 28 of the United States Code provides:

> Security for damages or costs shall not be required of the United States, any department or agency thereof or any party acting under the direction of any such department or agency on the issuance of process or the institution of prosecution of any proceeding.

This provision, based on the old 28 U. S. C. 870, reflects the obvious absurdity of compelling the United States to post bond furnished by a private company whose financial resources are, by comparison, feeble.

That the United States may maintain a limitation proceeding, without posting a bond, is implicit in the provisions of the Suits in Admiralty Act,[20] under which the United States was joined

[20] Act of March 9, 1920, 41 Stat. 525, as amended. 46 U. S. C 741, *et seq.*

as a defendant by the cargo-owners against whom the limitation petition here involved is directed. (See *supra*, p. 4). That Act, in conferring a right to suit against the United States, where the United States-owned vessel is employed as a merchant vessel, expressly provides that the United States shall not be required to give any bond in admiralty proceedings against it (Sec. 3), and specifically confers upon the United States the benefits "of all limitations of liability accorded by law" (Sec. 6).[21] Where the United States, therefore, petitions for limitation of liability asking for a *concursus* of claims asserted or assertable against it under the Suits in Admiralty Act, as it did in the instant case, it cannot of course be deemed to have waived its immunity from the bond-posting requirement. The only case on this point so holds. *The El Sol,* 45 F. 2d 852, 855–856 (S. D. N. Y.), affirmed *sub nom. Southern Pacific Co.* v. *United States,* 72 F. 2d 212 (C. C. A. 2). Since the bond requirement therefore has no application to the United States, it is obvious that

[21] The only other statute conferring the right to sue the United States in admiralty for damages caused by United States-owned public vessels provides that suits thereunder shall "proceed in accordance with the provisions of" the Suits in Admiralty Act. Public Vessels Act of March 3, 1925, 43 Stat. 1112, Sec. 2, 46 U. S. C. 782. The Public Vessels Act, like the Suits in Admiralty Act, also makes available to the United States "all limitations of liability." Sec. 10, 46 U. S. C. 789.

dismissal of the petition on the ground that the $325,000 bond "is too small" (R. 27) was, at least so far as the United States is concerned, clearly incorrect.

Moreover, even if the petition for limitation had been defective because the security posted was inadequate or otherwise defective, it would have been improper for the court below to affirm dismissal of the petition. Such defects are not jurisdictional; and the proper procedure would have been to remand the cause to the district court in order to afford opportunity for amending the petition and bond so as to remove whatever deficiencies existed. See *Bigler* v. *Waller*, 12 Wall. 142, 149; *Davis* v. *Wakelee*, 156 U. S. 680; *New Orleans Ins. Co.* v. *Albro Co.*, 112 U. S. 506; *Stewart* v. *Masterson*, 124 U. S. 493. This procedure is permissible under Rule 8 of the Rules of Practice in Admiralty (28 U. S. C. foll. § 723).

D. The Petition for Limitation was not Prematurely Filed

The opinion of the court below seems to intimate that, in the event additional suits should be filed, petitioners would be able to invoke their right of limited liability and that the sufficiency of the neeessary bond could be determined at that time (R. 27).

The suggested justification for the dismissal of the petition for limitation of liability contrasts

sharply with this Court's policy of safeguarding such petitions against improvident dismissal. Even where no present need for limitation is apparent, this Court has rejected attempts to dismiss the petition. *Langnes* v. *Green*, 282 U. S. 531, emphasizes the dangers of, and consequent need for preventing, indiscriminate dismissals of limitation petitions. In that case, the district court was directed not to dismiss such a petition "as a matter of precaution * * * in the possible but * * * unlikely event" that petitioner might need to invoke the benefits of R. S. 4283 in the district court at some later date. The desirability of ordering such precautions in the *Langnes* case is evidenced by *Ex parte Green*, 286 U. S. 437, which was decided by this Court after "the possible but unlikely event," *i. e.*, the challenging of petitioner's right to limit liability in the state court, had materialized.

The matter need not, however, be resolved by reference merely to considerations of judicial policy. Congress, in the Act of June 5, 1936 (49 Stat. 1479, 1480), amended R. S. 4285 so as to require the shipowner to assert his privilege to limit liability within six months after claim has been made against him. Prior to that amendment, there was no time fixed within which such a petition might be filed. House Report No. 2517, 74th Cong., 2d sess., p. 6. Consequently, the im-

provident dismissal of a petition did not then prejudice the shipowner who, at any later time, even after judgment was had against him (*Larsen* v. *Northland Transportation Co.*, 292 U. S. 20) or even after appeal from the judgment and the giving of a supersedeas (*The Victor*, 1 F. Supp. 931 (E. D. N. Y.)), could file additional petitions. However, since the 1936 amendment, it is clear that a shipowner cannot avail himself of his privilege of filing a petition after the six-months' period. *Petition of Goulandris*, 140 F. 2d 780 (C. C. A. 2), certiorari denied *sub nom. Goulandris et al.* v. *American Tobacco Co.*, 322 U. S. 755; *The Fred Smartley, Jr.*, 108 F. 2d 603, 607 (C. C. A. 4), certiorari denied *sub nom. S. C. Loveland, Inc.* v. *Pennsylvania Sugar Co.*, 309 U. S. 683; *Standard Wholesale Phosphate and Acid Works, Inc.* v. *Travelers Insurance Co.*, 107 F. 2d 373 (C. C. A. 4).[22]

[22] In addition to his right to initiate proceedings by petitioning for exoneration or limitation of liability and so secure a *forum concursus* and restrain other suits, the shipowner may plead limitation as a defense in his answer to a claimant's libel against him. *The Scotland*, 105 U. S. 24, 33–34. While the six-months' limit imposed by the 1936 amendment is clearly applicable to petitions for limitation, it may not be applicable to pleading of limitation of liability in the answer. *The Chickie*, 141 F. 2d 80, 84 (C. C. A. 3); *Coryell* v. *Pilkington*, 39 F. Supp. 142, 145 (S. D. Fla.), affirmed, 128 F. 2d 702 (C. C. A. 5), affirmed, 317 U. S. 406; *De Pinto* v. *O'Donnell Transp. Co.*, 293 N. Y. 32; *Cantey* v. *McLain Line, Inc.*, 40 F.

Recognizing this, the court below itself has heretofore held that a timely-filed petition should not be dismissed but should be allowed to stand, since "by some chance, which at the moment is too remote for practical recognition, other claims should appear" which would require a pro rata distribution of an inadequate fund and thus make a *concursus* necessary. *Curtis Bay Towing Co.* v. *Tug Kevin Moran, Inc.*, 159 F. 2d 273, 276 (C. C. A. 2). The extreme remoteness of the need for a *forum concursus* in the *Curtis Bay Towing* case is evidenced by the fact that, at the time the motion to dismiss the petition was rejected, claims aggregating only $17,000 had been asserted against a maximum liability fund of $209,000. When those figures are compared to the claims and liability fund in the instant case,[23] there can be no doubt that the petition here should have been allowed to stand. Such action could not have prejudiced the cargo-claimants and would not have deprived petitioners of the benefits of a limitation proceeding even after the six-months period had elapsed.

Supp. 887 (S. D. N. Y.); *Carpenter* v. *Mary R. Mullins, Inc.*, 33 F. Supp. 10, 12 (D. Mass.); *The Bright*, 38 F. Supp. 574, 576 (D. Md.); *De Cruz* v. *Hiering*, 69 F. Supp. 397 (D. N. J.); cf. *United States Gypsum Co.* v. *Conners Marine Co.*, 119 F. 2d 689, 690 (C. C. A. 2); *The Joseph O'Donnell*, 37 F. Supp. 120 (E. D. N. Y.).

[23] See pp. 35–37, *supra*.

CONCLUSION

It is respectfully submitted that the judgment below is erroneous and should be reversed, with directions to overrule the exceptions.

PHILIP B. PERLMAN,
Solicitor General.

H. G. MORISON,
Assistant Attorney General.

PHILIP ELMAN,
Special Assistant to the Attorney General.

SAMUEL D. SLADE,
MORTON HOLLANDER,
Attorneys.

NOVEMBER 1948.

APPENDIX A

1. Section 4283 (a) of the Revised Statutes, as amended by the Act of June 5, 1936 (49 Stat. 1479, 46 U. S. C. 183 (a)), reads as follows:

> SEC. 4283 (a). The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

2. Section 4284 of the Revised Statutes (2d ed., p. 827, 46 U. S. C. 184) reads as follows:

> SEC. 4284. Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for

the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto.

3. Section 4285 of the Revised Statutes, as amended by the Act of June 5, 1936 (49 Stat. 1480, 46 U. S. C. 185), reads as follows:

> SEC. 4285. The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter, as amended, and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 4283, as amended. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

4. Section 4286 of the Revised Statutes (2d Ed., p. 827, 46 U. S. C. 186) reads as follows:

> SEC. 4286. The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his

own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this Title relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

* * * * *

APPENDIX B

The pertinent provisions of the International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels (League of Nations Treaty Section 2763, Vol. 120, p. 125; U. S. Treaty Information Bulletin No. 20, May 1934, p. 13; 27 Amer. Journal of International Law (Supp.), p. 7, provide:

> ARTICLE 1. The liability of the owner of a seagoing vessel is limited to an amount equal to the value of the vessel, the freight, and the accessories of the vessel, in respect of—
>
> 1. Compensation due to third parties by reason of damage caused, whether on land or on water, by the acts or faults of the master, crew, pilot, or any other person in the service of the vessel;
>
> * * * * * *
>
> Provided that, as regards the cases mentioned in Nos. 1, 2, 3, 4, and 5 the liability referred to in the preceding provisions shall not exceed an aggregate sum equal to 8 pounds sterling per ton of the vessel's tonnage.
>
> * * * * * *
>
> ART. 4. The freight referred to in Article 1, including passage money, is deemed, as respects vessels of every description, to be a lump sum fixed at all events at 10 per cent of the value of the vessel at the commencement of the voyage.
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U. S. GOVERNMENT PRINTING OFFICE 1948